

- (1) Whether the claimant suffered an accidental injury.

- (2) Whether the injury arose out of and in the course of the claimant's employment.
- (3) Whether notice was timely given.
- (4) Whether temporary total disability should be ordered payable after November 1, 1993 and until further order of the Court.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for purposes of preliminary hearing, the Appeals Board finds as follows:

(1) The issues raised by the respondent in his application for review as to whether the claimant suffered an accidental injury; whether the injury arose out of and in the course of his employment; and whether timely notice was given are issues, if disputed, are considered jurisdictional and subject to review by the Appeals Board. K.S.A. 44-534a(a)(2). The claimant in his application for review has asked the Appeals Board to order temporary total benefits paid after November 1, 1993 and until further order of the Administrative Law Judge. The Appeals Board finds that this issue is not reviewable by the Appeals Board as the Administrative Law Judge, pursuant to K.S.A. 44-534a(a)(2), has the authority to make an award of temporary total disability compensation within his discretion in a Preliminary Order pending a full hearing on the claim.

(2) The Appeals Board, after reviewing the whole record, affirms in all respects Administrative Law Judge James R. Ward's Order of compensation dated December 15, 1993, ordering temporary total compensation be paid and medical treatment be provided claimant.

In proceedings pursuant to the Workers Compensation Act, the burden of proof is on the claimant to establish his right to compensation and to prove the various conditions on which the claimant's right depends. K.S.A. 44-501(a). "Burden of proof" is the burden a party has to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record. K.S.A. 44-508(g).

In the case at hand, the claimant through his testimony and medical records admitted into evidence at the preliminary hearing held on December 6, 1993, before Administrative Law Judge James R. Ward has established by a preponderance of the credible evidence that he aggravated an old neck injury while working for the respondent from July 28, 1993 through August 17, 1993. In order for the claimant to perform his job requirements, the claimant was required to work over his head using his hands and arms to do repetitive scraping and scrubbing motions.

Claimant testified that because of the pain and numbness in his arms and hands and the pain in his neck and shoulders he sought medical treatment at St. Francis Hospital and Medical Center in Topeka, Kansas, on August 12, 1993. Such visit was verified by medical records of St. Francis Hospital Medical Center entered into evidence in the preliminary hearing. Claimant further testified that the day after such medical treatment, he notified Les, a supervisor for the respondent, and also a secretary in the office that he was having problems with his arms and hands and had received medical care the day before at St. Francis Hospital and Medical Center.

Respondent has entered into evidence in this case, a written note from a meeting

which allegedly occurred on September 3, 1993, indicating that the claimant told two employee's of the respondent that he might have a workers compensation claim. Such writing is not signed by anyone but states that the claimant talked to Pat and Jack Powers about his alleged injuries. However, the claimant when asked if that was the first time he told the employer about his injury, replied as follows:

"No, that's the first time I officially asked them for workers compensation."

K.S.A. 44-520 provides in part that proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, is given to the employer within 10 days after the date of accident, and actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The claimant has established through his testimony that he told authorized agents of his work connected injuries within 10 days from the date of his accident.

AWARD

WHEREFORE, it is the finding, decision and order of the Appeals Board that the Preliminary Hearing Order of Administrative Law Judge James R. Ward dated December 15, 1993, remains in full force and effect.

IT IS SO ORDERED.

Dated this _____ day of March, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

I respectfully dissent from that portion of the majority opinion finding that claimant established through his testimony that he told authorized agents of his work connected injuries within 10 days from the date of his accident.

K.S.A. 44-520 states:

"Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and the particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer with 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided by this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice."

Claimant alleges that he advised a secretary and a supervisor of his injury on the day that he went to the hospital.

Claimant's Preliminary Hearing Exhibit No. 1, the August 12, 1993 emergency room note from St. Francis Hospital, indicates that claimant advised the hospital employees that he "does not feel it's work related."

Claimant's Preliminary Hearing Exhibit No. 2, the medical records from the VA Hospital dated September 2, 1993, indicate claimant complained of pain and numbness in his bilateral arms and hands and further indicated he advised the hospital he had a history of soft tissue damage in the neck after an altercation four years ago while a police officer.

Respondent's Exhibit No. 1 consisting of the August 30, 1993 medical records of Dr. Bair, indicate that claimant suffered "soft tissue and nerve damage from an assault in 1985 - has had problems c hands since saw orthopedist in Maine."

The first documented indication that claimant advised his employer of the injury is found in Respondent's Exhibit No. 3. This September 3, 1993 handwritten note from the employer indicated that the claimant might have a workers compensation claim, but that he was not sure and went on to say that he'd been told by the doctor to file for workers compensation to help pay for the medical bills which he himself could not afford to pay for. Up to this time the medical records indicate that claimant related his physical problems back to the 1984 injury in Maine and not to his employment with respondent.

K.S.A. 44-501(a) states in part:

"In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation by proving the various conditions on which the claimant's right depends."

K.S.A. 44-508(g) defines burden of proof as follows:

"'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true," on the basis of the whole record.

The burden of proof is upon the claimant to establish his right to an award for compensation by proving all the various conditions under which his right to a recovery depends. This must be established by a preponderance of the credible evidence. Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

The claimant's allegation that he advised the respondent prior to September 3, 1993 of the alleged injury is contradicted by every medical record in existence up to September 3, 1993. A preponderance of the credible evidence up to that point indicates claimant made no comment to the employer until September 3, 1993, which is beyond the 10 day statutory limit set out in K.S.A. 44-520.

In any proceeding for compensation wherein notice is provided subsequent to the 10 day time limit but within 75 days after the date of the accident, the lack of notice shall not bar proceedings for compensation under the workers compensation act if the claimant can show that the failure to notify the employer under K.S.A. 44-520 was due to "just cause." As this issue was not raised at the preliminary hearing and no evidence was taken regarding the possibility of claimant having "just cause" for failing to provide notice to the employer of the injury, this matter should be remanded to the Administrative Law Judge pursuant to K.S.A. 44-551(b)(1) for further proceedings to ascertain whether "just cause" exists to explain claimant's failure to notify the respondent under K.S.A. 44-520 of the injury within 10 days of the date of injury.

BOARD MEMBER

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